

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LESTER MARTIN
Claimant

VS.

MONFORT, INC.
Respondent

AND

CITY INSURANCE COMPANY
Insurance Carrier

Docket No. 152,124

ORDER

Claimant appealed the Award of Administrative Law Judge Thomas F. Richardson dated July 29, 1994, that denied claimant's claim for workers compensation benefits.

APPEARANCES

Claimant appeared by his attorney, Beth Regier Foerster of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Bradley C. Ralph appearing for Terry J. Malone of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

Claimant appealed requesting review of the following issues:

- (1) Whether claimant suffered personal injury by accident arising out of and in the course of his employment on September 17, 1990.
- (2) The nature and extent of claimant's disability.
- (3) Payment of past medical expenses incurred for claimant's care and treatment.
- (4) Payment of future medical expenses for claimant's care and treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The dispositive issue in this case is whether claimant's myocardial infarction (heart attack) that occurred while he was performing his work activities for the respondent arose out of and in the course of his employment. The Administrative Law Judge denied claimant's claim for workers compensation benefits, finding that the claimant had failed to prove that it was more probably true than not that an extreme external force was the substantial causative factor in producing claimant's injury and resulting disability.

Claimant did not argue that the exertion of his work was the agency necessary to precipitate his resulting disability. Therefore, the heart amendment contained in K.S.A. 1990 Supp. 44- 501(e) that requires evidence of unusual exertion does not apply to this case. See Dial v. C.V. Dome Co., 213 Kan. 262, 515 P.2d 1046 (1973). Claimant's claim for workers compensation benefits was predicated on the fact that his injury and resulting disability was substantially caused by the temperature of his working environment. Claimant argued that he presented evidence which established that the heat he was working in at the time of his heart attack was a substantial external force which was a substantial causative factor in producing the heart attack and resulting disability. Respondent takes the position that claimant's burden was to present evidence that heat was an extreme external force on the day of the incident compared to that of only an external force. Furthermore, respondent argued that claimant failed to present expert testimony that heat was a substantial causative factor in producing the heart attack. Accordingly, respondent asserted that the Appeals Board should affirm the Administrative Law Judge's Award that denied claimant's claim for workers compensation benefits.

On the date claimant suffered his heart attack, he had been employed by respondent as a cooker operator in the rendering department for approximately three years. Claimant was employed on second shift which commenced at 3 p.m. and ended at 11 p.m. Claimant was 56 years of age at the time of the heart attack. Minutes after taking a short break with his son and brother, who were fellow employees, claimant was found laying face down on a metal catwalk situated above the cookers at approximately 10:45 p.m. on September 17, 1990. The plant nurse, Sandra Lane, was immediately

summoned to the rendering department and found that claimant had stopped breathing and had no pulse. She immediately commenced CPR and continued the CPR until the EMT's arrived with the ambulance. Claimant was then transported to the emergency room at St. Catherine's Hospital in Garden City, Kansas. When claimant arrived at the emergency room he was comatose and non-responsive. He was hospitalized and had to be maintained on a ventilator for a number of days. Claimant was gradually taken off the ventilator but had suffered an anoxic brain injury due to an inadequate supply of oxygen to the brain that had occurred for a period of time. Claimant was discharged from St. Catherine's Hospital on October 17, 1990. He was referred for rehabilitation to an acute care rehabilitation hospital in Hays, Kansas. At the time of the regular hearing, April 20, 1993, claimant was unable to care for himself and was residing in a nursing home where full-time care was provided.

Both parties recognized that the announcement of the "external force" rule was made in Makalous v. Kansas State Highway Commission, 222 Kan. 477, 484, 565 P.2d 254 (1977), as follows:

"...but when it is established that the injury and the resulting disability are the product of some extreme external force in the working environment then compensation may be payable. To support a finding that claimant's cardiac or vascular injury is the product of some extreme external force the *presence of a substantial external force* in the working environment must be established and there must be expert medical testimony that the *external force was a substantial causative factor* in producing the injury and resulting disability." (Emphasis added).

The parties, however, disagree when an external force is claimed to be the cause of a heart attack, that the evidence must establish that the external force was "extreme." In the Makalous case, the court characterized claimant's working environment as being extreme cold. The term "extreme" is used there because the external force "cold" was in fact extreme. The Appeals Board does not, however, read the Makalous decision as one requiring that the external force be extreme. See Bulleigh v. Kansas Vocational Rehabilitation Center, Docket No. 183,852 (May 1994).

There are essentially two parts to the "external force" rule as announced in Makalous. The first part that has to be proved is whether there was an external force present in the claimant's work environment at the time of his heart attack. Respondent argued that the temperatures of the working environment as documented in the record would not be considered as any more than normal or routine regardless of the industrial setting. Claimant countered and argued that the evidence contained in the record established that claimant was required to work in a working environment and perform his work activities under conditions that were hot. The Appeals Board agrees with the claimant. The Appeals Board finds that the evidence established that the claimant had to perform his work activities as a cook operator in hot temperatures. Respondent's staff nurse, who was on duty when claimant suffered the heart attack, testified and admitted that the working environment in the rendering department was hot. Claimant's son, Kirk Martin, testified that he had worked at one time for a week as a cooker operator for the respondent and that he observed temperatures on a thermometer he carried that never went below 100 degrees. Ed Dobrinski, the second shift foreman in the rendering department, testified

that a cooker operator on second shift has to dump cooked product from the cooker 22 to 26 times per night. In order to dump the cooked batch of an inedible product the operator is required to hold the door open from three to five minutes standing above the product which is dumping out approximately two to three feet from the operator at 260 to 270 degrees. Eddy H. Gonzales, general foreman employed by the respondent, recorded temperature readings in the rendering cooking room and outside the respondent's plant from April 21, 1993, through May 4, 1993. These temperatures were recorded in the rendering room by the control panel and not over the cooker where claimant performed most of his work activities. The temperature in the rendering cooking room at 11 p.m. on April 23, 1993, with an outside of temperature of 64 degrees was 92 degrees. On the night of claimant's heart attack, the outside temperature was 65.98 degrees at 11 p.m. Furthermore, the record established that due to an earlier explosion in respondent's plant on the night of September 17, 1990, the 480-barrel fan, which was utilized to bring in the cool outside air, was not operating. The respondent also had recognized that the working environment of the rendering department was hot by routinely providing Gatorade to its workers. Claimant's son testified that on a regular hourly basis, he brought a 12 to 16 ounce cup of Gatorade to his father while they were both working on the second shift.

Having established that heat was an external force in claimant's working environment, the next question to be addressed is whether expert medical testimony established that the heat was a substantial causal factor in producing claimant's heart attack. Two medical experts testified in this case, Dan. A. Francisco, M.D., on behalf of respondent and Gerald B. Lee, M.D., on behalf of the claimant.

Dr. Francisco has been in private practice in Wichita, Kansas, for 14 years and specializes in cardiology. Ninety-nine percent of Dr. Francisco's practice is devoted to the care of patient's with cardiac disease. Dr. Francisco is board-certified in internal medicine, cardiovascular disease, and a Fellow of American College of Cardiology. The doctor also studied the effects of heat, cold, stress, and exercise during two years of his Ph.D. program in environmental stress physiology. The respondent employed Dr. Francisco for the purpose of rendering an opinion on the cause of claimant's myocardial infarction. He reviewed medical records concerning claimant's heart attack and the deposition of Dr. Gerald Lee. Dr. Francisco found from claimant's history that he had indigestion problems for some six months prior to his heart attack. In fact, claimant had a severe attack of indigestion in the morning, the day before his heart attack, while he was visiting relatives in Texas. Dr. Francisco analyzed claimant's history of indigestion and other risk factors such as his age, 56; tobacco abuse; no regular exercise program; overweight, and positive family history of premature cardiac disease. He then concluded that the infarction process had initiated some 24 to 48 hours before claimant's heart attack during the attack characterized as indigestion. At that time, the plaque in claimant's arteries became unstable. Dr. Francisco opined that the acute myocardial infarction would have progressed regardless of whether claimant was working in a hot environment for the respondent or was working in an artificial cooled environment in a sedentary occupation. Dr. Francisco was cross examined extensively by claimant's attorney. Dr. Francisco was asked to assume that claimant's working environment temperatures on the night of the heart attack were between 92 and 98 degrees. Dr. Francisco testified that claimant was very acclimatized to his work environment temperatures because he had worked in these temperatures for a number of years. Dr. Francisco was unequivocal when he opined that he knew of no

medical articles or literature that would suggest that a high ambient temperature and/or humidity would precipitate a rupture of cholesterol plaque and cause a heart attack.

Gerald B. Lee, M.D., of Kansas City, Kansas, because of eyesight problems had confined his practice to his office and medical/legal cases. Dr. Lee also testified that he was very active in organizations that represented environmental issues. Dr. Lee is board-certified in internal medicine, cardiovascular disease, and a Fellow of American College of Cardiology. Dr. Lee was employed by the claimant to review his medical records concerning his heart attack and to render an opinion on the cause of the heart attack. Dr. Lee opined that the claimant had preexisting underlying coronary artery atherosclerosis. However, in direct contrast to Dr. Francisco, Dr. Lee's opinion was that the high ambient temperatures in claimant's work place was the direct cause of his heart attack and not the claimant's underlying atherosclerosis. Furthermore, Dr. Lee found that heat increases the blood pressure, pulse, adrenaline, noradrenaline or epinephrine, and norepinephrine output which did cause the fracture of claimant's plaque in the right coronary artery. Dr. Lee had formed his initial opinion of causation on claimant's heart attack with the information that the temperatures in claimant's work place were ghastly, that is in excess of 100 degrees. On cross examination, Dr. Lee opined that if the temperatures were, in fact, 95 to 98 degrees he would not be so strong on his opinion that heat was the cause of claimant's heart attack. Nevertheless, Dr. Lee went on to state that it was his understanding that it was hot in the working environment and the heat would have then played a "key role" in causing claimant's heart attack.

The Appeals Board has studied the qualifications of the two medical experts, cardiologists, Dr. Lee and Dr. Francisco. Their deposition testimony has been reviewed in depth. The Appeals Board is cognizant of the fact that the two medical experts opinions are divergent. However, taking into consideration both of these opinions and the evidentiary record as a whole, the Appeals Board finds that Dr. Francisco's overall testimony and opinions are more persuasive and credible than that of Dr. Lee. Therefore, the Appeals Board adopts Dr. Francisco's opinion that claimant's hot working environment on the day of his heart attack had absolutely no causal connection to his heart attack. The Appeals Board finds that the heart attack could have occurred at any time because of claimant's coronary artery disease and the external force of his working environment did not substantially cause the heart attack and resulting disability.

(2)(3)(4) The Appeals Board, having found the claim noncompensable, finds it is unnecessary to decide the other remaining issues, as they are moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Thomas F. Richardson dated July 24, 1994, should be, and is hereby affirmed in all respects and the claimant, Lester Martin, is denied an award of compensation benefits against the respondent, Monfort, Inc., and its insurance carrier, City Insurance Company.

All other orders entered by the Administrative Law Judge are hereby adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
 Bradley C. Ralph, Dodge City, KS
 Administrative Law Judge, Garden City, KS
 Philip S. Harness, Director